



US Department
of Transportation

**Research and
Special Programs
Administration**

Office of the
Chief Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

MAY 18 2004

BY FACSIMILE

Mr. John L. Atwood
President
Rhode Island Trucking Association, Inc.
660 Roosevelt Avenue
Pawtucket, RI 02680-1008

Dear Mr. Atwood:

This responds to your April 19, 2004 letter concerning a proposed Rhode Island law that would impose the following requirements on carriers who transport and deliver certain chemicals in portable tanks or tank trailers with a rated capacity of 301 gallons or more:

--the fire department in the city or town in which the chemicals are to be delivered must be notified at least 24 hours in advance of the delivery; and

--the motor vehicle driver must have at least (a) two years experience transporting these chemicals, or (b) one year experience transporting these chemicals plus an OSHA Hazardous Material "40N" Certificate.

RSPA does not have sufficient resources to conduct thorough reviews of non-Federal (State local, and Indian tribe) requirements outside of the preemption determination process set forth in subpart C of 49 C.F.R. Part 107 (beginning at § 107.201). Moreover, our review of proposed or draft requirements cannot consider the manner in which the requirements would actually be "applied or enforced," a factor on which a determination of preemption often depends. 49 U.S.C. § 5125(a)(2). Informal reviews are also hindered by the absence of the public input that occurs in the formal determination process established in 49 U.S.C. § 5125(d)(1).

Nonetheless, at your request, I am providing you with my personal, informal, and unofficial comments on whether Federal hazardous material transportation law would preempt a Rhode Island law enacting the proposed requirements. I also refer you to the most recent index and summary of administrative determinations and court decisions on hazardous materials preemption at our website: <http://rspa-atty.dot.gov> (click on "Preemption" and then "Preemption of State and Local Laws on Hazardous Materials Transportation"). However, I

am not responding to your question about whether these proposed requirements are an “impediment” to interstate commerce, because RSPA’s administrative determinations do not normally address issues of preemption arising under the Commerce Clause of the U.S. Constitution.

Preemption Standards

The statutory criteria for preemption of non-Federal requirements on the transportation of hazardous materials are set forth in 49 U.S.C. § 5125. In summary, a non-Federal requirement is preempted (unless it is specifically authorized by another Federal law) when:

1. it is not possible to comply with both the non-Federal requirement and the Federal hazardous material transportation law, the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, or a hazardous materials security transportation regulation or directive issued by the Secretary of Homeland Security (DHS).
2. the non-Federal requirement is an obstacle to accomplishing and carrying out the Federal hazardous material transportation law, the HMR, or a DHS hazardous materials transportation security regulation or directive.
3. the non-Federal requirement concerns any of five specific subjects and is not “substantively the same as” a provision in the Federal hazardous material transportation law, the HMR, or a DHS hazardous materials transportation security regulation or directive. One of these subject areas is “the designation, description, and classification of hazardous material.”
4. a non-Federal routing requirement does not comply with regulations of the Federal Motor Carrier Safety Administration in 49 C.F.R. Part 397, subparts D and E.
5. a fee related to the transportation of a hazardous material is not fair or is used for a purpose that is not related to transporting hazardous material (including enforcement and planning, developing, and maintaining a capability for emergency response).

Materials Regulated

The Rhode Island legislation would apply the proposed advance notification and driver qualification requirements to carriers that transport and deliver any of eleven named chemicals regulated under the HMR (often by different proper shipping names in the Hazardous Materials Table in 49 C.F.R. § 172.101). These chemicals are in various hazard classes or divisions, and they are also in different packing groups: (a) most of the corrosives in Class 8 are in Packing Group II, but one is in Packing Group III; (b) aqueous solutions of hydrogen peroxide are in Division 5.1 but may be in any Packing Group, depending on their concentration; (c) aqua ammonia (ammonia solution) with a certain relative density and concentration is in Class 8, Packing Group III, but otherwise anhydrous ammonia and ammonia solutions are in Division 2.2 for domestic transportation.

The proposed legislation does not contain any indication of why these chemicals would be chosen for additional regulation in transportation, and others would not be included. There does not appear to be any “common thread” among them, based on their properties or risks in transportation. Rather, this group of chemicals seems to be an arbitrary list about which the Rhode Island legislature may have some unspecified concern. In effect, this group of chemicals would be a “new hazard class” which is not “substantively the same as” the classification of hazardous materials in the HMR and, accordingly, preempted by 49 U.S.C. § 5125(b)(1)(A). RSPA has explained that:

If every jurisdiction were to assign additional requirements on the basis of independently created and variously named subgroups of [hazardous] materials, the resulting confusion of regulatory requirements would lead directly to the increased likelihood of reduced compliance with the HMR and subsequent decrease in public safety

Inconsistency Ruling (IR) No. 18 (Prince Georges County, Maryland), 52 Fed. Reg. 200, 202 (Jan. 2, 1987), decision on appeal, 53 Fed. Reg. 28850 (July 29, 1988); IR-12 (St. Lawrence County, New York), 49 Fed. Reg. 46650, 46651 (Nov. 27, 1994).

For this reason, it is my opinion that Federal hazardous material transportation law would preempt the additional requirements proposed to be applied to these eleven chemicals.

Advance Notification

RSPA has repeatedly found that advance notification requirements are preempted because they have a substantial likelihood of causing an unnecessary delay in the transportation of hazardous materials. The HMR specifically require shipments of hazardous materials to be “transported without unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination,” 49 C.F.R. § 177.800(d), so that any requirement that creates the potential for unnecessary delay would normally be considered an “obstacle” to accomplishing and carrying out the HMR. However, in many cases, a carrier itself will not have 24 hours advance notice of a shipment, and it would have to delay delivery to wait until that time had passed.

In Natural Tank Truck Carriers, Inc. v. Burke, 535 F. Supp. 509 (D. R.I. 1982), affirmed, 698 F.2d 559 (1st Cir. 1983), the court upheld RSPA’s finding in IR-2, 44 Fed. Reg. 75566 (Dec. 20, 1979), decision on appeal, 45 Fed. Reg. 71881 (Oct. 30, 1980), that Federal hazardous material law preempted a Rhode Island requirement for a carrier of liquefied propane gas (LPG) or liquefied natural gas (LNG) to apply for a permit and provide specific information at least four hours before transporting these materials within the State. The court observed that, in many cases, the information cannot be provided,

until the cargo is actually loaded on the truck, . . . The requirement that the permit must be applied for no less than four hours prior to shipment means that a loaded truck has to remain outside of Rhode Island for a minimum of four hours after loading before a permit is issued allowing movement of the [LPG or

LNG]. If the [LPG or LNG] is to be shipped from out of state, from a location less than four hours travel time away, for example, Massachusetts or Connecticut, then an unnecessary delay must result.

535 F. Supp. at 517.

Other decisions finding that advance notification requirements are preempted include Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458, 462 (8th Cir. 1993), affirming 781 F. Supp. 612 (D. Minn. 1991); Colorado Pub. Util. Comm'n v. Harmon, 951 F.2d 1571, 1582-83 (10th Cir. 1991), upholding RSPA's decision in IR-27 (Colorado), 54 Fed. Reg. 16326 (Apr. 21, 1989); Preemption Determination (PD) No. 20 (Cleveland, Ohio), 66 Fed. Reg. 29867, 28973-74 (June 1, 2001); IR-32 (Montevallo, Alabama), 55 Fed. Reg. 36736, 36746 (Sept. 6, 1990); IR-30 (Oakland, California), 55 Fed. Reg. 9676, 9682 (Mar. 14, 1990); IR-16 (Tucson, Arizona), 50 Fed. Reg. 20872, 20877-80 (May 20, 1985); and IR-6 (Covington, Kentucky), 48 Fed. Reg. 760, 764-66 (Jan. 6, 1983).

Based on the reasoning in these cases, my opinion is that Federal hazardous material transportation law would preempt the proposed requirement to provide at least 24 hours advance notification to the fire department in the city or town in which the chemicals are to be delivered.

Driver Qualifications

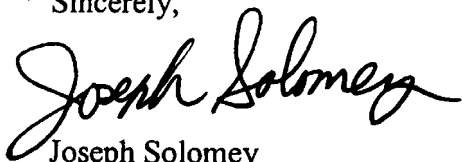
The proposed requirement for a driver to have a certain amount of experience transporting these chemicals appears to be a form of a "training" requirement, either by itself or in conjunction with obtaining an OSHA Hazardous Material "40N" Certificate. (We are not familiar with the "40N" Certificate or any Occupational Health and Safety Administration 40-hour training program for motor vehicle drivers.) This specific driving experience would be in addition to the hazmat employee training required by the HMR.

The HMR provide that a State may impose "more stringent training requirements" for motor vehicle drivers only if the State's additional requirements do not conflict with the Federal training requirements and "[a]pply only to drivers domiciled in that State." 49 C.F.R. § 172.701. RSPA has found that additional training or qualification requirements imposed on out-of-state drivers are an "obstacle" to accomplishing and carrying out this provision in the HMR. In PD-7(R), 59 Fed. Reg. 28913, 28918-19 (June 3, 1994), RSPA determined that, with respect to drivers who are not domiciled within the State, Federal hazardous material transportation law preempts a Maryland requirement for drivers of vehicles transporting "controlled hazardous substances" to take "an approved training program" and pass "an approved written examination." In PD-22(R), 67 Fed. Reg. 59396, 59400-02 (Sept. 20, 2002), decision on petition for reconsideration, 68 Fed. Reg. 55080 (Sept. 22, 2003), RSPA found that New Mexico's driver examination and certification requirements that exceed the training requirements in the HMR are preempted with regard to out-of-state drivers of vehicles used to deliver LPG.

Accordingly, it is my opinion that Federal hazardous material transportation law would preempt the proposed requirement for drivers of vehicles used to deliver the listed chemicals to have at least (1) two years experience transporting these chemicals, or (2) one year experience transporting these chemicals plus an OSHA Hazardous Material "40N" Certificate (whatever that certificate may be). While Rhode Island would be permitted to impose an additional experience (or training) requirement on drivers domiciled within the State, there would also appear to be a practical problem in this requirement for a driver who lacks the required experience. It would appear necessary for the driver to transport these chemicals in States other than Rhode Island because, without that experience, he (or she) would not be allowed to transport these chemicals in Rhode Island in order to obtain the required experience. It would seem unlikely for the Rhode Island legislature to intend for drivers domiciled in Rhode Island to be disadvantaged in this manner.

I hope these comments are helpful. If you need any further information, you may contact me or Frazer Hilder of my staff at the above address, by telephone at 202-366-4400, or by fax at 202-366-7041.

Sincerely,

A handwritten signature in black ink, reading "Joseph Solomey". The signature is fluid and cursive, with the first name "Joseph" and last name "Solomey" clearly distinguishable.

Joseph Solomey
Assistant Chief Counsel for Hazardous Material
Safety and Emergency Transportation Law

cc: Richard Moskowitz, Esq.
American Trucking Associations, Inc.